

# for The Defense

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Maricopa County Public Defender's Office

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## Contents:

### TRIAL PRACTICE

- \* Vindictive Prosecution: Focusing on Your Client's Rights Page 1
- \* Representing HIV Clients Page 3

### MOTION AND BRIEF BANK

- \* March Brief Bank Deposits Page 4

### FEBRUARY JURY TRIALS

Page 5

### ARIZONA ADVANCED REPORTS

- \* Volume 128 Page 6

### PERSONNEL PROFILES

Page 11

### MISSION STATEMENT

Page 12

## **Vindictive Prosecution: Focusing on Your Client's Rights**

by Timothy J. Ryan and Slade A. Lawson

What a revolting development! Your client was originally charged with possession of cocaine for sale (a class 2 felony), but received a TASC offer. To make your client eligible for TASC, the county attorney even agrees to refile the matter as the lesser offense of possession of cocaine (a class 4 felony). You dutifully fill out the paperwork. Your client rewards your hard work by missing all the court dates.

Needless to say, TASC is no longer offered when your client returns. In fact, the new county attorney takes a dim view of your client. The new offer for a class 5 felony is essentially what your client could receive if she were convicted at trial. Obviously, the new county attorney has not seen the original complaint. Your client is advised of the plea offer, and the range of different possibilities if she were convicted. Your client takes a dim view of the county attorney's plea offer and insists on going to trial.

After trial is set the county attorney realizes, to her chagrin, that your client is not facing mandatory prison if convicted at trial. Feeling utterly naked without this tool, and still holding a dim view of your client, the county attorney tells you that she intends to refile the matter as the more serious charge which requires mandatory prison. You advise your client of this new twist and your client immediately shouts, "Vindictive prosecution!"

You ask yourself several questions. What is vindictive prosecution? What is the standard of review for prosecution? Can there be a presumption of vindictive prosecution in the pretrial setting?

The seminal case on vindictive prosecution is *Blackledge v. Perry*.<sup>1</sup> Mr. Perry successfully appealed a misdemeanor conviction and obtained a trial *de novo*. After Mr. Perry obtained his appeal, but prior to his appearance at trial *de novo*, the prosecutor obtained a felony indictment against Mr. Perry pertaining to the same conduct for which Mr. Perry had been convicted as a misdemeanor. Mr. Perry argued that the prosecutor's actions violated the Due Process Clause of the Fourteenth Amendment.<sup>2</sup>

The U.S. Supreme Court began its analysis with *North Carolina v. Pearce*,<sup>3</sup> *Colten v. Kentucky*,<sup>4</sup> and *Chaffin v. Stynchcombe*,<sup>5</sup> several cases that involved the imposition of increased punishment by a judge or jury upon retrial after a successful appeal. These cases held that the Due Process Clause is violated even where the circumstances merely "pose a realistic likelihood of vindictiveness."<sup>6</sup>

The *Blackledge* case involved conduct of the prosecutor instead of judge or jury. There was no evidence that the prosecutor acted in bad faith or with malice, but because of its chilling effect on the lawful pursuit of appellate rights, the Court held that the prosecutor's conduct violated due process.<sup>7</sup> Justice Rehnquist filed the lone dissenting opinion, which served as a sign of things to come for limiting claims of due process violations.<sup>8</sup>

(cont. on pg. 2)

The Supreme Court limited the presumption in *Blackledge* in two of its subsequent decisions, *Bordenkircher v. Hayes*<sup>9</sup> and *U.S. v. Goodwin*.<sup>10</sup> In *Bordenkircher*, the Supreme Court reaffirmed the general rule that, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."<sup>11</sup> The Court then held that this rule does not apply when a prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense to which he was originally charged. Without proof of actual malice, such a threat is part of the normal "give and take" of plea negotiations.<sup>12</sup>

In *U.S. v. Goodwin*, the defendant expressed an initial willingness to plead guilty, then demanded a trial. The case was re-assigned to a new prosecutor who reviewed the file and decided to refile the matter as a felony. Mr. Goodwin was convicted of the felony and filed an appeal.<sup>13</sup> Unlike *Bordenkircher*, Mr. Goodwin was never threatened with the filing of more serious charges if he refused the plea.<sup>14</sup> Instead, Mr. Goodwin argued that because the prosecutor filed felony charges after his demand for trial, the government's actions were presumptively in violation of the Due Process Clause. The Court ruled that under the *Bordenkircher* analysis, no "presumption of vindictiveness" would be applied.<sup>15</sup>

(cont. on col. 2)

## FOR THE DEFENSE

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Many have read the *Goodwin* decision as the death knell for vindictive prosecution claims in the pretrial setting; however, upon closer inspection, the case is not as limiting as some believe. First, the opinion limits itself to the facts of Mr. Goodwin's case. *Goodwin* only holds that there is no automatic entitlement to a presumption of vindictiveness in a pretrial setting.<sup>16</sup> The Court then stated why the presumption should not apply to Mr. Goodwin's case, i.e., additional facts may become known to the prosecutor after filing a charge, or the prosecutor's assessment of the case may not have "crystallized."<sup>17</sup> The Supreme Court did not foreclose a defendant's right to show actual vindictiveness where a prosecutor decides to punish an accused for invoking his legal rights, even in the pretrial context.<sup>18</sup> Nonetheless, the broad discretion given to prosecutors in the pretrial context has led many to ignore consideration of vindictive prosecution claims for conduct occurring prior to trial.

The Arizona Court of Appeals breathed new life into the presumption of vindictive prosecution in *State v. Tsosie*, 114 Ariz. Adv. Rep. 3 (App. 1992). In that case the trial court applied a presumption of vindictiveness even though the prosecutorial conduct complained of occurred prior to trial. The Arizona Court of Appeals noted that a showing of actual vindictiveness is almost impossible to make, and held that a defendant may rely on a presumption of vindictiveness under appropriate circumstances. The Court held that the proper analysis to apply to the facts of the case was the *totality of circumstances* test.<sup>19</sup> After reviewing the case the Court ruled that it warranted a presumption of vindictiveness, because the facts did not provide an "objective indication that would allay a reasonable apprehension by the defendant that the more serious charge was vindictive." Because the government did not overcome this presumption the Court affirmed the dismissal, citing *U.S. v. Meyer*.<sup>20</sup>

The government asked the Arizona Court of Appeals to interpret *Goodwin* as a ban on the application of presumptive vindictiveness in the pretrial context. The Court noted that the United States Supreme Court did not ban the application of a presumption of vindictiveness in a pretrial context. The Court again cited *Meyer*<sup>21</sup> in support of its ruling that a presumption of vindictive prosecution could arise in the pretrial setting.

In *Meyer*, the defendants were members of about 200 protesters who were arrested for marching outside the White House without a permit. Those who chose to go to trial found out at their arraignments that the state filed an additional charge which was more serious.<sup>22</sup> The D.C. Circuit began its analysis by defining vindictive prosecution as a "situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights."<sup>23</sup> Using this definition, the Court ruled that the procedural history of the case warranted a presumption of vindictiveness. The Court did not read *Goodwin* to prohibit an application of presumptive vindictiveness in the pretrial setting. Instead, the Court read *Goodwin* as limited to the facts of that decision. The Court also noted that *Goodwin* had many predicate facts in common with *Meyer*, with one important exception. Noting the disparate treatment between those who opted to pay the fifty dollars and those who elected to go to trial, the Court found the prosecutor's actions to be presumptively vindictive and affirmed dismissal of the charges.<sup>24</sup>

(cont. on pg. 3)

Motions to dismiss based on prosecutorial vindictiveness are not things of the past, as many assumed after *Goodwin*. Claims of vindictive prosecution need not necessarily invite acrid battles with the prosecution. The proper objective, where there is no proof of actual malice, is to show that the totality of circumstances reasonably suggests an appearance of vindictiveness. The focus is the impact of such conduct on your client's right to due process of law. If the prosecutor has acted in a way that creates even an appearance of malice, with no reasonable justification, then it does not matter whether there is actual malice toward your client. The issues are simply whether the conduct appears to be vindictive, and, if so, whether the government can articulate a legitimate state interest that rebuts the presumption of vindictiveness. Focusing on these issues will best ensure protection of your client's right to due process of law.

<sup>1</sup>417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

<sup>2</sup>*Blackledge v. Perry*, 417 U.S. at 23-25, 94 S.Ct. at 2099-2100.

<sup>3</sup>395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656.

<sup>4</sup>407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584.

<sup>5</sup>412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714.

<sup>6</sup>*Blackledge v. Perry*, 417 U.S. at 28, 94 S.Ct. at 2102.

<sup>7</sup>*Id.*, at 2102-2103.

<sup>8</sup>*Id.*, at 2104.

<sup>9</sup>434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 (1978).

<sup>10</sup>457 U.S. 368, 73 L.Ed.2d 74, 102 S.Ct. 2485 (1982).

<sup>11</sup>*Bordenkircher* at 668.

<sup>12</sup>*Id.*

<sup>13</sup>*Goodwin* at 2487-2488.

<sup>14</sup>*Id.*, at 2492.

<sup>15</sup>*Id.*, at 2493-2494.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 2494.

<sup>19</sup>*Tsosie* at 3.

<sup>20</sup>*Id.*, at 5.

<sup>21</sup>810 F.2d 1242 (D.C. Cir.), opinion vacated, 816 F.2d 695, reinstated, 824 F.2d 1240 (1987).

<sup>22</sup>*Tsosie* at 5.

<sup>23</sup>*Meyer* at 1243-1244.

<sup>24</sup>*Id.*, at 1245.

## Representing HIV Clients

By Christopher Johns

The constitutional rights of privacy and liberty are closely related and seem inseparable at times. When the virus that causes AIDS was first identified more than nine years ago, legal commentators feared that in the resulting public hysteria, health officials would implement measures depriving people of their civil rights. To a large degree that was averted; however, in contrast to the general trend, the criminal justice system has forcibly tested, prosecuted, convicted, and sentenced people for committing certain crimes while infected with HIV. This "criminalization" of HIV has

many adverse effects on our clients that are infected with this terrible illness.

Because of public hysteria and discrimination surrounding HIV and AIDS, one of the greatest challenges in criminal practice is representing an HIV-infected client. This article discusses some of the issues in representing the HIV-seropositive or AIDS client.

### Generally

Defense counsel, in addition to challenging the government's charges against the client, must in many instances deal with discrimination issues against the HIV-seropositive client. At all times, defense counsel should do everything that insures appropriate and dignified treatment of the client by jail and court personnel, and prevents unnecessary safety measures that can only serve to ridicule and draw attention to the client's status. Additionally, defense counsel has an ethical obligation to show respect for and to zealously represent the client. Paramount, in dealing with HIV-seropositive clients, is keeping their status confidential.

### Confidentiality

Defense counsel should never disclose a client's HIV infection without first assessing the potential adverse consequences, discussing the issues with the client, and obtaining the client's permission. The client's HIV status is covered by the doctor-patient and attorney-client privilege (A.R.S. Sec. 13-4062), and the ethical rules of conduct (ER 1.6). Moreover, Arizona law presently provides limited circumstances under which the HIV status of anyone may be disclosed. Unless disclosure falls into one of several distinct categories, it is a class 3 misdemeanor to disclose a person's HIV-seropositive status, and there is civil liability. See A.R.S. Sec. 36-664, and 667. Unfortunately, the legislature is taking a second look at these statutes this year and may repeal some of the safeguards gained in 1990 legislation that provided some protection to those who are HIV-seropositive or have AIDS and are accused of crimes.

In some cases there may be valid reasons to disclose a client's HIV status. For example:

- \*Obtain a bail reduction.

- \*Obtain better medical care while incarcerated.

- \*Factor to argue for diversion, or for a more favorable plea offer.

- \*Factor to argue for dismissal of the case.

- \*Need to argue for continuance for medical treatment or expedite case because of medical consequences.

- \*Client's AIDS-related mental incapacity may constitute a defense to the charges.

- \*May provide mitigating circumstances for sentencing.

- \*Client may be mentally or physically incompetent to stand trial as result of HIV/AIDS.

(cont. on pg. 4)

However, the disclosure of HIV infection may have serious and wide-ranging ramifications on the client. The ramifications must be carefully weighed against the perceived need to waive the physician- or attorney-client privileges. Adverse consequences of disclosure include:

- \*May waive doctor-patient privilege and any state law HIV confidentiality protection.

- \*Client will suffer discrimination and harassment in jail, court and all other parts of criminal justice system, as well as by outside world.

- \*May be reported in media.

- \*Possibility of enhanced charges/future transmission prosecutions.

- \*May interfere with a fair trial.

- \*May cause court to institute unnecessary medical precautions in courtroom and subject client to ridicule.

- \*Possibility of bias in sentencing.

Moreover, broad dissemination of information about HIV infection will almost always expose a defendant to some added ridicule. In some cases here in Maricopa County, for example, prosecutors, police, probation officers, and investigators have revealed an accused person's HIV-seropositive condition to witnesses, alleged victims, employers, landlords, neighbors, and even jurors after a trial. In some instances this unethical conduct should be brought to the attention of the court or the bar.

#### *Limited Disclosure*

In the case where disclosure is decided upon, with the client's consent, defense counsel should reveal HIV-related information in a way that safeguards it against widespread dissemination and limits it to those that need information in order to help the client. For example, better medical care might be obtained without going to court by speaking directly to the jail's medical director. If disclosure to the judge and the prosecutor is necessary, defense counsel can do so in chambers on the grounds that confidentiality, besides being provided for by statute, is necessary to protect the client from harassment and violence.

Defense counsel should also treat medical confidences like all other privileged information, and never assume that family and friends are aware of the diagnosis. A client's confidence will be violated by discussion of this information if you erroneously assume that family, or anyone else, is aware of the client's condition.

For trial purposes, unless it is a part of the theory of defense counsel's case, a motion to prevent the introduction of the accused seropositive status should be filed. Where the evidence is introduced by the government and is irrelevant, a mistrial for prosecutorial misconduct should be moved for.

#### *Opposing Attempts to Compel HIV-Antibody Testing*

Because compulsory disclosure infringes upon every person's fundamental right to personal choice and right to privacy, defense counsel should oppose mandatory disclosure HIV testing. In Arizona, such testing is sought for non-evidentiary purposes under the guise of victims' rights.

A.R.S. Sec. 13-1415(A) gives the court discretion before a conviction to order testing, if the *client consents*. There is rarely ever any set of circumstances where it would benefit a client to consent. However, after a conviction a person may be tested if a victim petitions the court, and if after an evidentiary hearing, the state can demonstrate that significant exposure occurred. See A.R.S. Sec. 13-1415.

The problem, of course, is that the victim's interest is not served by having the defendant tested. Rarely, for example, can the defendant's status be related back to the time of exposure. Moreover, present testing techniques frequently result in either false negative or positive results. What the victim really needs to know is whether he or she is infected. This knowledge can only be obtained by the victim's testing several months after an exposure. That is, the test can only reveal the defendant's status at the time of the test, not at the time of the crime.

Moreover, there are no treatment options that the victim needs to know about if they are recently infected. Presently, there is no medical intervention until the immune system begins to breakdown.

Mandatory testing, besides right to privacy implications specifically protected by our Arizona Constitution, also may have Fourth Amendment ramifications. Even if testing is authorized by statute, where it is sought for non-evidentiary purposes, the Constitution requires that all searches be reasonable. In order to satisfy reasonableness, a blood test should only be authorized by a search warrant issued upon a showing of probable cause that the test will yield material evidence. These issues need to be fully litigated in any case where the state is seeking to test a person.

The Training Division has a great deal of information available to assist practitioners in cases where the state seeks to impose a mandatory test. If you have such a case, please inform us. ^

#### **March Brief Bank Deposits**

Editor's Note: The Maricopa County Public Defender's Office Brief Bank contains motions, jury instructions and briefs filed by our appellate division. Terminals are located on the 10th floor of the main library, the 3rd floor appeals library, Durango Juvenile Facility, and the Southeast Court Center for Group C. The following notes some of the recent deposits in our Brief Bank. Please retrieve from the Brief Bank any discussed motions or briefs, or contact the author.

(cont. on pg. 5)

## *Battered Woman's Syndrome*

*State v. Wimbley*, 1 CA-SA 93-0062 (March 1993)

Authors: Mara Siegel & Donna Elm. This response to a special action argues that in light of the harshness of a plea, enactment of a domestic violence provision (battered woman's syndrome) to the criminal justification statutes, and further facts, that the court properly modified a previous ruling to allow testimony during trial of battered woman's syndrome as to this particular client.

## *DNA*

*State v. Timberlake*: CR 91-01321 (filed February 1993).

Author: Anna Unterberger. This motion argues against the admissibility of forensic DNA evidence and requests a *Frye* hearing on the issue. Arguing that since the state has not produced protocols for its statistical analysis or intends to introduce same, any so-called "matching" should be inadmissible. Moreover, in view of a recent National Research Counsel report critical of present DNA procedures, that a *Frye* hearing must be conducted.

## *Insufficient Information*

*State v. Williams*: CR 92-08737 (filed November 1992).

Author Ray Schumacher. This motion argues that charges should be dismissed, pursuant to Rule 16.5, Ariz. R. Crim. P., because the information is insufficient as a matter of law. During a preliminary hearing, defense counsel established that the accused possessed a valid California Driver's license, even though his Arizona license was revoked. Case dismissed.

## *Prosecutorial Misconduct*

*State v. Bagby*: CR 92-08502 (filed December 1992).

Author: David Goldberg. This motion argues that a plea offer contingent upon defense counsel foregoing litigating a motion to suppress is a denial of due process of law and effective assistance of counsel. Relying upon *Draper* and ABA Standards for Criminal Defense, defense counsel argues that this prosecutorial policy forces defense counsel to forgo zealous representation and annuls Fourth Amendment protections.

## *Suppression*

*State v. Jacobson*: CR 92-09221 (filed January 1993).

Author: Larry Grant. This motion argues, based upon A.R.S. Sec. 13-3916(B), that police officers failed to comply with providing sufficient notice ("knock and announce") when entering the accused's residence.

*State v. Mitchell*: 1 CA-CR 92-1146 (Opening Brief Filed March 1993).

Author: Jim Rummage. This brief argues that investigative stop of the defendant was unjustified, that there was no justification for a weapons search, and that the detention of the defendant exceeded the bounds of *Terry*.

## *Trial*

*State v. Baker*: 1 CA-CR 92-0764 (Opening Brief Filed March 1993).

Author: Stephanie Swanson. This brief argues, that the convictions must be overturned because of prosecutorial misconduct, that the trial court impermissibly made comments to the jury, that one of the jury instructions shifted the burden of proof, and that the trial judge erred in instructing the jury that "reasonable doubt" does not include "possible doubt."

## *Venue*

*State v. Bartlett*: CR 91-00997 (filed August 1991).

Author: Daniel Shepard. This motion argues that the accused cannot obtain a fair trial in Maricopa County and therefore its location should be moved. Motion denied. ^

## February Jury Trials

### *February 1*

Susan Bagwell: Client charged with first degree murder. Investigator C. Yarbrough. Trial before Judge Hilliard ended February 16. Client found not guilty on first degree murder and attempted murder, second degree. Client found guilty on second degree murder, armed burglary and aggravated assault. Prosecutor Ditsworth.

Rena Glitsos: Client charged with transportation of marijuana for sale. Investigator M. Fusselman. Trial before Judge Gerst ended February 8. Client found guilty. Prosecutor A. Davidson.

### *February 2*

David Brauer: Client charged with attempted sexual assault. Investigator A. Velasquez. Trial before Judge Schneider ended February 24. Client found not guilty. Prosecutor L. Tinsley.

### *February 3*

Peggy LeMoine: Client charged with aggravated DUI. Investigator D. Erb. Trial before Judge Hertzberg ended February 8. Client found guilty.

Ray Schumacher: Client charged with leaving the scene of fatal accident. Trial before Judge Colosi ended February 11. Client found guilty. Prosecutor J. Duarte.

(cont. on pg. 6)

John Taradash: Client charged with possession of marijuana. Investigator Jones. Trial before Judge Galati ended February 4. Client found not guilty. Prosecutor Liles.

Vonda Wilkins: Client charged with theft. Investigator G. Beatty. Trial before Judge Grounds ended February 10. Client found guilty. Prosecutor M. Hamm.

#### *February 4*

Kevin Van Norman: Client charged with two counts child molestation, kidnapping and attempted sexual conduct. Investigator D. Moller. Trial before Judge Hendrix ended February 10. Client found not guilty on 1 count of child molestation and guilty on kidnapping and attempted sexual conduct. Judgment of acquittal on 1 count of child molestation. Prosecutor A. Williams.

#### *February 8*

Shelley Davis: Client charged with sale of narcotic drugs. Trial before Judge Jarrett ended February 12 with a hung jury (6-2 in favor of not guilty). Prosecutor Sullivan.

#### *February 9*

William Stinson: Client charged with possession of cocaine/heroin. Trial before Judge Galati ended February 11. Client found guilty. Prosecutor Hinchcliffe.

Raymond Vaca: Client charged with two counts of aggravated assault. Trial before Judge Portley ended February 17. Client found not guilty. Prosecutor B. Miller.

#### *February 16*

David Anderson: Client charged with aggravated assault. Investigator R. Thomas. Trial before Judge Sheldon ended February 18. Client found guilty. Prosecutor G. McKay.

Robert Corbitt: Client charged with possession of narcotic drug and possession of drug paraphernalia. Investigator G. Beatty. Trial before Judge Grounds ended February 17. Client found guilty. Prosecutor J. Martinez.

Marie Farney: Client charged with sale of marijuana. Investigator D. Tadiello. Trial before Judge Dougherty ended February 18. Client found guilty. Prosecutor Canter.

James Likos: Client charged with kidnapping, attempted aggravated assault and attempted sexual assault. Trial before Judge Colosi ended February 18. Client found not guilty. Prosecutor Beatty.

Joseph Stazzone: Client charged with aggravated assault (client waives jury in consideration for State dismissing dangerous allegation). Investigator D. Erb. Trial before Judge Bolton ended February 17. Client found not guilty. Prosecutor D. Bash.

#### *February 17*

Curtis Beckman: Client charged with possession of marijuana. Trial before Judge O'Melia ended February 18. Client found guilty. Prosecutor Armijo.

Daniel Shepard: Client charged with aggravated DUI. Trial before Judge Brown ended February 22. Client found not guilty. Prosecutor Wales.

#### *February 18*

Robert Ellig: Client charged with fraudulent schemes. Investigator D. Tadiello. Trial before Judge Seidel ended February 23. Client found guilty. Prosecutor Cudahy.

Richard Krecker: Client charged with eight counts of child molestation. Investigator D. Tadiello. Trial before Judge Hilliard ended February 23 in a mistrial. Prosecutor J. Garcia.

#### *February 22*

Vonda Wilkins: Client charged with aggravated assault, dangerous. Investigator G. Beatty. Trial before Judge Grounds ended February 26. Client found guilty of lesser charge: disorderly conduct. Prosecutor T. Glow. ^

### **Arizona Advanced Reports**

#### *Volume 128*

#### *State v. Cohen*

128 Ariz. Adv. Rep. 6 (S.Ct. 12/15/92)

The defendant and his co-defendants were charged with conspiracy to commit fraud. The defendant moved for a new determination of probable cause, arguing he was not vicariously liable for his co-conspirators' acts. The trial court agreed and remanded the case to the grand jury. The State filed a petition for special action.

The State claims that a person charged with conspiracy is liable for acts committed by co-conspirators, even where they do not directly participate in those crimes. *Pinkerton v. United States*, 328 U.S. 640 (1946). The *Pinkerton* theory of liability is not part of the Arizona statutory scheme. Arizona's conspiracy statute does not specifically include the *Pinkerton* doctrine and Arizona's statute on accomplice liability is not broad enough to make an accused vicariously liable by simply agreeing to the commission of a crime with another. *Pinkerton's* vicarious liability for crimes reasonably foreseeable and committed in furtherance of the conspiracy goes far beyond Arizona's accomplice liability statute.

(cont. on pg. 7)

The defendant's wife was called by the State to testify at the grand jury proceedings and testified about events occurring during the marriage. The trial court granted the motion to remand based in part upon a finding that the anti-marital fact privilege had been violated. A.R.S. Sec. 13-402(1) provides that a spouse shall not be examined as a witness against his/her spouse as to events occurring during the marriage without the spouse's consent. The State claims that the wife's testimony was not against her husband because it was neither relevant nor prejudicial to her husband's criminal liability. The statute contains no substantive testimonial limitation. The words "for or against" do not mean favorable or unfavorable; they simply mean "on behalf of." The statute forbids any testimony, not just damaging testimony. A spouse has a right to keep his/her spouse from giving any testimony as to events which occurred during their marriage, not just testimony which actually damages his/her interests. However, remand is only required where the defendant is denied a substantial procedural right. Because the spouse's testimony was not prejudicial, no substantial procedural right was involved and no remand is necessary.

*State v. Arana*  
128 Ariz. Adv. Rep. 5 (S.Ct. 12/10/92)

The defendant pled guilty to a class 6 open-ended offense and was placed on probation. The Court also imposed the \$100.00 felony assessment penalty under A.R.S. Sec. 13-812. The defendant claims that the felony assessment penalty was improperly imposed because felony sanctions could not yet be imposed on an undesignated offense. The Court of Appeals agreed and struck the assessment. The Arizona Supreme Court reverses the opinion of the Court of Appeals. A.R.S. Sec. 13-702(H) provides that the offense shall be treated as a felony for all purposes until actually designated a misdemeanor. The contingent possibility that the offense may ultimately be designated a misdemeanor at some future date does not detract from the reality that the person has been convicted of a class 6 felony. A.R.S. Sec. 13-702(H) does not provide immunity from felony sanctions at the time of sentencing.

*State v. Diaz*  
128 Ariz. Adv. Rep. 28 (S.Ct. 12/17/92)

The defendant signed a plea agreement to a class 6 "open-ended" offense. At the time of sentencing the trial judge designated the offense a felony. Defendant moved to withdraw from the plea agreement, claiming that the felony designation violated its terms. On appeal, the Arizona Court of Appeals reversed *State v. Diaz*, 835 P.2d 477 (App. 1992). The Supreme Court reverses the Court of Appeals' opinion in *Diaz*. The plea agreement provided that this was an open-ended offense. It further provided that, in the Court's discretion, the offense could be designated a class 1 misdemeanor. A defendant is entitled to withdraw his guilty plea if he mistakenly believes the terms of the plea agreement are more lenient than the sentence imposed. There is no objective evidence that the defendant misunderstood the plea agreement. The plea agreement contains no language that limits the trial court's ability to designate the offense a felony. The court proceedings at the change of plea clearly

establish that the plea agreement did not take away any of the trial court's sentencing options. The terms of the written plea agreement and the oral statements made in court at the change of plea made clear the full range of sentences the defendant faced. No substantial objective evidence established that defendant misunderstood the terms of the plea agreement. A defendant need not be allowed to withdraw from a plea agreement merely because of a disagreement with the sentence. The trial court was not obliged to permit the defendant to withdraw and was not precluded from designating the offense a felony at the time of sentencing. [Represented on appeal by Spencer D. Heffel, M.C.P.D.]

*State v. Medrano*  
128 Ariz. Adv. Rep. 23 (S.Ct. 12/17/92)

The defendant was charged with first degree murder, kidnapping, sexual assault and burglary. He was convicted after a jury trial and sentenced to death for the murder charge, plus 21 years for the remaining charges.

Defendant was initially interrogated by Arizona authorities. He was later located in Mexico. He was interrogated by Mexican authorities in the presence of a Texas police officer. He was returned to Arizona and made more statements. Prior to trial, defendant moved to suppress the statements he made in Mexico. Defendant claimed his Mexico statements were coerced because they were beating him and he was deprived of food and water. At the hearing, two Mexican police officers and the Texas police officer all testified about the statements. Arizona officers also testified that there were no marks, scratches or bruises on the defendant when placed in their custody. Because confessions are prima facie involuntary, the court must find the confession admissible by a preponderance of the evidence. There was more than sufficient evidence in this case for the court to properly deny the motion to suppress.

Defendant also claims that his statements to Arizona authorities after his arrest were involuntary. Defendant first confessed upon being taken into custody and later confessed after being read his *Miranda* rights. The trial court found that the first statement was voluntary and not the result of police interrogation. The court found that the second statement was made in compliance with *Miranda* and was voluntary. The trial court heard the testimony and the defendant's statements were properly admitted.

Defendant, whose I.Q. is 75, claims his confessions are involuntary and his waiver of his *Miranda* rights invalid because he is mentally retarded and more prone to suggestion than others. Although below average, an I.Q. of 75 is higher than that generally thought to be evidence of mental retardation. There was no showing here that the defendant's borderline intelligence requires that his statements be deemed involuntary. Defendant also claims it was ineffective assistance of counsel for his attorney to fail to raise this claim of borderline intelligence at trial. The court was able to clearly determine from the record that the ineffective assistance claim is meritless.

(cont. on pg. 8)

After trial, defendant filed a motion to vacate judgment. The motion claimed that newly discovered exculpatory evidence existed. Defendant claimed that a six-year-old witness now recalled the presence of three people at the scene with the defendant. Defendant also claims that the prosecution's failure to disclose this evidence violated *Brady v. Maryland*, 373 U.S. 83 (1963). The court held an evidentiary hearing. The court found that the evidence was not newly discovered because the witness was known to the defense and available for interview prior to trial. The court also found that the testimony was not exculpatory because it was consistent with defendant's earlier confessions. The trial court did not abuse its discretion in denying the motion. The test for a *Brady* violation is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury. The child's testimony would have indicated at most that others were at the scene of the crime, not that the defendant did not commit the crime. The evidence overwhelmingly pointed to the defendant's guilt and the judge did not error in denying the motion.

Defendant claims that the death sentence was wrongly imposed because the crimes committed were not especially cruel or heinous and that the statute is unconstitutionally broad and vague. Cruelty focuses on the sensations of the victim before death. Heinousness focuses on society's views of the murder as compared to other murders. The State proved beyond a reasonable doubt that the victim suffered pain and was conscious at the time of the offense. This crime was also heinous because of the gratuitous violence inflicted on the victim and the victim's helplessness. The statute is also not unconstitutionally broad or vague. *Walton v. Arizona*, 497 U.S. 639 (1990).

The trial court also found that the defendant committed this offense while in custody. At the time of the murder, defendant was serving a federal sentence at a half-way house. To fall within A.R.S. Sec. 13-703, a defendant must commit the offense while in the custody of the State Department of Corrections, a law enforcement agency or the county or city jail. The intent of this section is to protect the guards and other inmates at such institutions where the defendant is confined and to discourage violence by incarcerated persons. A.R.S. Sec. 13-703(F)(7) does not apply to this case because the defendant was not confined nor was he incarcerated when he committed the offense. Because this sentencing factor must be set aside, the matter is remanded for resentencing.

*State v. Monge*  
128 Ariz. Adv. Rep. 3 (S.Ct. 12/3/92)

The defendant was a passenger in a pick-up truck. The police stopped the truck for a traffic violation. The police ordered the defendant out of the truck. The driver sped away, leaving the passenger behind. The officers handcuffed the defendant, frisked him for weapons and searched his wallet. They found a small amount of cocaine. Defendant filed a motion to suppress, arguing it was an illegal arrest and search. The motion was denied and the defendant convicted at trial.

Defendant claims that the trial court erred in denying his motion to suppress. The defendant was under arrest when he was handcuffed. There was no probable cause for the illegal arrest. The State argues that the defendant consented to the search of his wallet, which the defendant disputes. Even assuming consent, the evidence must be suppressed if the unconstitutional conduct is not sufficiently attenuated from the subsequent search. *State v. Kempton*, 166 Ariz. 392 (App. 1990). The Fourth Amendment prohibits the State from obtaining evidence by consent when that consent is the product of an illegal arrest. Three factors determine whether the taint of the illegal conduct is sufficiently attenuated from the evidence subsequently obtained by consent: the time elapsed, the presence of intervening circumstances, and the purpose and flagrancy of the original official misconduct. *Brown v. Illinois*, 422 U.S. 590 (1975). In this case the police seized the cocaine minutes if not seconds after the illegal arrest at the scene. There is also no suggestion that any intervening circumstances purged the taint of the illegal arrest. The constitutional violation also seems flagrant. The State does not even claim that the police made an arguable mistake in arresting defendant. The arresting officer did not believe he had probable cause to search or arrest defendant but arrested him anyway. An arrest, knowingly made without probable cause, is precisely the type of conduct that *Brown* seeks to deter. Even if consent existed, the search and discovery of the cocaine was impermissibly tainted by the preceding illegal arrest and should have been suppressed. The conviction is reversed.

*State v. Nunez*  
128 Ariz. Adv. Rep. 32 (Div. 2, 12/17/92)

The defendants were arrested and charged with possession of marijuana for sale. Bond was set for each defendant. When the defendants failed to appear for a hearing, the judge ordered that bench warrants be issued. Prior to trial, the judge granted a motion to suppress the evidence and dismissed the cases with prejudice. Subsequently, defendants move to exonerate their bonds. The court ordered the bonds forfeited.

Defendants argue that because the indictments against them were dismissed with prejudice prior to trial and prior to their bonds being forfeited, they are entitled to have their bonds exonerated. The primary purpose of an appearance bond is to assure the defendant's presence at the time of trial. The charges against the defendants were dismissed prior to trial and there was no further need for their appearance bonds. Rule 7.6(e) provides that anytime there is no further need for an appearance bond, it shall be exonerated. Rule 16.5(e) provides that when a prosecution is dismissed any appearance bond shall be exonerated. Once the cases were dismissed, the trial court was required by the rules to exonerate the bonds. Since no forfeiture hearing was held prior to the dismissal of defendants' cases, they were entitled to have their bond exonerated.

(cont. on pg. 9)

Defendant was convicted of first degree murder, kidnapping and first degree burglary. He was sentenced to death for the murder and to concurrent terms of imprisonment for the burglary and kidnapping.

#### Expert Testimony

At trial, a criminalist testified regarding the presence of human blood in the victim's home. Defendant contends that her testimony should have been excluded on the grounds that she was a non-disclosed witness. Defendant claims he was prejudiced by this lack of disclosure because the presence of the blood in that portion of the room undercut his claim that he was never on that side of the room. The decision whether to exclude a witness rests within the trial court's discretion. Though not specifically disclosed before trial, the defendant did have a copy of the expert's report. The state also specifically asked that the expert's name be added to the list of witnesses to be identified to the jury panel. Defense counsel was also allowed extra time to interview the witness and a recess was taken so that the blood could be tested by defense expert. Finally, the witness only testified that the stain was made by human blood. It was not identified as the blood of the victim or of the defendant. Under the circumstances, the trial court was within its discretion in not excluding the expert's testimony.

At trial, the prosecution called a detective to testify about footprint evidence. While defense counsel initially filed a motion in limine to preclude the evidence, he later withdrew the motion and did not object to the testimony. On appeal, appellate counsel argues that the testimony should have been excluded because the detective was not qualified to testify. By failing to argue this claim at trial, reversal is required only if fundamental error occurred. The detective had been trained in tracking, and had conducted numerous investigations to determine points of entry. Whether a witness is competent to testify is a matter left to the trial court's discretion. No fundamental error occurred.

The defendant wished to introduce expert testimony on the general effects of alcohol in the human body. The court denied the admission of this testimony. Defendant argues that the expert's testimony would have corroborated his own testimony and would have provided the necessary foundation for an intoxication instruction. The effect of alcohol intoxication is an area within the common knowledge and experience of a jury. No expert testimony is needed to assist the trier of fact. The expert would also not have been able to corroborate the defendant's own testimony because he had no first-hand knowledge of the defendant's condition on the night of the offense, or any familiarity with the defendant's personal alcohol abuse problems. An intoxication instruction was given at trial. No error occurred.

#### Trial Publicity

Prior to trial, the case received considerable media coverage. Defendant claims that this pretrial publicity required a change of venue. A motion for change of venue is discretionary with the judge. The moving party is required

to prove that the dissemination of the prejudicial media coverage will probably result in the party being deprived of a fair trial. The trial judge conducted a voir dire examination of those jurors who had prior knowledge of the case from newspaper or television reports. Defendant claims that this questioning in the presence of all prospective jurors caused cross-contamination of the panel. While the trial judge asked initial questions in front of the panel, general questioning ended and the judge conducted individual voir dire of each juror who had any prior knowledge. There was proper safeguards against cross-contamination. No change of venue was required.

There was also substantial media coverage during the trial. Defendant claims that the coverage deprived him of a fair trial. Defendant did not move to declare a mistrial based on media coverage during the trial and has waived the issue. Even if not waived, the claim is meritless. The judge repeatedly admonished the jurors to avoid media stories concerning the trial. When stories did appear, the judge questioned the jury to determine if any jurors read them. No juror had. No error occurred.

#### Photographs

The victim was beaten, strangled, and left on top of an overturned table. The State introduced a photograph of the victim as she was found. Defendant claims that the photograph is both irrelevant and unduly prejudicial. To determine whether such a photograph is admissible, first the photograph must be relevant. Second, the court must inquire whether the photograph would tend to inflame passion or inflame the jury. The court then balances the probative value against the potential for unfair prejudice. Relevant photographs may be admissible even if they are gruesome. The medical examiner who testified at trial used the photo to demonstrate the details of the murder and support his conclusions regarding the victim's death. The photo was also probative on the issue of intent. The trial judge did not abuse his discretion.

#### Jury Instructions

Appellate counsel claims that review of the jury instructions in this case is hampered because the jury instruction settlement conference was held off the record. The instructions were first informally discussed off the record pursuant to stipulation and then formally settled on the record. This is a perfectly proper procedure. Defense counsel was given full opportunity to make a complete record on jury instructions and did so to the extent deemed appropriate.

Defendant claims that the trial court erred in failing to instruct the jury on second degree murder. The State proceeded on dual theories of premeditated and felony murder. Second degree murder is not a lesser included offense of felony murder. At trial defendant claimed that he was in no way responsible for the victim's death. Because defendant's theory of the case denied all involvement in the killing, there was no evidence to provide a basis for a second degree murder instruction. When the record is such that defendant is either guilty of the crime charged or not guilty, the trial court should refuse a lesser included instruction.

(cont. on pg. 10)

Defendant argues that the instruction on premeditation should not have been given. Defendant failed to object at trial and has waived the issue absent fundamental error. Given the evidence at trial, the argument that a premeditation instruction was unwarranted is meritless.

Defendant claims that the trial judge should have instructed the jury concerning the legal effects and consequences of voluntary intoxication. The trial judge did give the jury an intoxication instruction as requested by defense counsel. The supplemental instruction requested by defense counsel was unnecessary.

At trial the jury was instructed on the elements of armed burglary. Defendant objected that there was no evidence that he or his co-defendant possessed a dangerous instrument while entering or leaving the home. It is sufficient for armed burglary if a dangerous instrument was possessed while remaining in the house unlawfully. Defendant also argues that no burglary instruction should have been given because there was no showing that the defendant entered the residence with any intent to commit a felony. This argument accords preclusive effect to the defendant's version of the evidence. Jury instructions are not determined by such a unilateral view of the evidence.

At trial, the judge read a flight instruction to the jury. Defendant argues that the evidence does not support the flight instruction because his departure from the scene was not precipitated to avoid the police. He argues that simply leaving the scene of a crime is not flight. If the evidence shows a defendant's manner of leaving the scene of a crime reveals a consciousness of guilt, an instruction on flight is permissible even in the absence of pursuit. Defendant ran, not walked, from the crime scene. He removed his shoes and discarded them because he knew his shoe prints were in the house. Because defendant's actions can be read to reveal a consciousness of guilt, the flight instruction was properly given.

Defendant requested an instruction on his theory of the case. He claimed that he left the residence before the murder which was committed solely by his co-defendant. The trial court rejected the instruction, noting that it merely reinstated concepts already included within the felony murder instruction. When the jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language. Defendant's theory of the case was encompassed within the felony murder instruction. His requested instruction was merely the converse of the felony murder instructions. No error occurred.

Defendant's co-defendant was tried and convicted in a separate trial. Defendant claims that the jury should have been instructed about the disposition of the co-defendant's case. The trial judge refused the instruction but did instruct the jury on the principles of accomplice liability. The guilt or innocence of a co-defendant is not relevant to the issue of the guilt or innocence of the accused. No error occurred.

The court instructed the jury that kidnapping was one of the predicate offenses for felony murder. Defendant contends that felony murder is inapplicable where the felony is an offense necessarily included in the charge of homicide. Defendant failed to object on this basis during trial and has waived the objection absent fundamental error. The facts of

this case do not fit defendant's argument. It is possible to commit murder without kidnapping. The kidnapping occurred when the victim was beaten on her bed and dragged to the floor. The murder occurred later when she was strangled on the floor. These facts do not merge as assault and homicide can coalesce. No error occurred. Under the facts of this case, no error occurred.

Defendant requested an instruction that no person should be convicted upon suspicion, or mere probability, or from the fact that he may have had an opportunity to commit the crime. The jury was instructed on the need for the state to prove its case beyond a reasonable doubt and given the definition of reasonable doubt. As long as the basic concept is covered the additional instruction need not be given.

Defendant claims that he is entitled to separate verdicts to determine that the jury unanimously convict the defendant of either premeditated or felony murder. This argument has previously been rejected in *State v. Lopez*, 163 Ariz. 108 (1990).

### Imposition of the Death Penalty

Defendant argues that the Arizona statute is unconstitutional because it provides for sentencing by a judge, places the burden of proof on defendant to prove mitigating circumstances, and presumes the death penalty to be appropriate if one or more statutory aggravating circumstances are proved. The Arizona Statute is also unconstitutionally overbroad and vague, lacks sufficient guidance, is discriminatory in application, is cruel and unusual, does not adequately restrict the prosecutor's decision to seek the death penalty, and is imposed arbitrarily and irrationally in Arizona. All of these arguments have been decided against the defendant's position in previous cases.

Defendant claims that the death penalty was improperly imposed because the crime was not especially heinous, cruel or depraved. Defendant argues that the victim lost consciousness before her death. Cruelty involves the pain and suffering of the victim. The evidence showed the victim had defensive wounds on her arms and hands. The defendant had scratch marks on his chest. The presence of the defensive wounds and scratch marks indicates the victim was conscious through some considerable portion of her agony. The trial court's finding of cruelty is adequately supported by the record. Defendant claims the trial court erred in finding that the crime was heinous or depraved. This finding focuses on the defendant's mental state and attitude as evidenced by his words and actions. The victim was helpless and subjected to gratuitous violence. The trial judge did not error in finding this crime heinous or depraved.

Defendant claims that the court overlooked mitigating circumstances sufficiently substantial to call for leniency. Defendant first claims that he was possibly convicted only on a felony murder theory. The death penalty may be properly imposed if a defendant convicted of felony murder was a major participant in the predicate felony and acted with reckless disregard for human life. *Tison v. Arizona*, 481 U.S. 137 (1987). *Tison* is applicable to the defendant's case and supports the imposition of the death penalty even under a felony murder theory.

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Defendant claims his intoxication significantly impaired his capacity to appreciate the wrongfulness of his action and must be considered a mitigating circumstance. The trial court considered but rejected intoxication. The defendant has failed to prove this particular circumstance. Only the defendant testified that he was intoxicated that evening. He was thinking clearly enough after the murder to discard his shoes. Such an act clearly suggests that he appreciated the wrongfulness of his conduct. The trial court did not err in failing to find intoxication as a mitigating circumstance.

Defendant claims that he did not foresee any grave risk of danger to anyone as he thought the home was unoccupied. The trial judge did not consider this a mitigating circumstance. There was ample evidence that the house was occupied and that defendant knew the victim lived there. The claimed unforeseeability of the victim's death was not a mitigating circumstance.

Defendant claims that his age of 22 years is a mitigating circumstance. In this case defendant presented no evidence of how his youth caused him to lack substantial judgment in committing the crime. His maturity and past experiences show that his age was not a mitigating factor.

#### Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel. He argues that while an experienced lawyer was appointed as trial counsel, a less experienced lawyer functioned as lead counsel at trial. Defendant relies upon the standards promulgated by the National Legal Aid and Defender Association. The court rejects the NLADA standards and applies the *Strickland* test.

Defendant claims that his counsel should have ascertained the basis for the prosecutor's decision to seek the death penalty. The prosecutor disclosed in written pleadings the exact basis for seeking the death penalty long before the sentencing hearing. Defense counsel was not deficient for trying to require more.

Defendant claims that his counsel had insufficient pretrial contacts with him and failed to keep him informed of the status of the case. Counsel is effective so long as there has been sufficient meetings for counsel to keep defendant informed as to the status of the case and represent him adequately.

Defendant claims his lawyer should have filed more pretrial motions but fails to show what additional motions would have been useful. Defendant has failed to show any prejudice.

Defendant claims that his trial counsel was unprepared for trial. He argues that counsel's failure to note the undisclosed expert's report and subsequent testimony undermined the defense theory and prohibited counsel from fully developing an intoxication defense. Defendant has been unable to show any prejudice from these events.

Defendant claims that his attorney was ineffective at sentencing. He cites to evidence in the presentence report, but the record shows the trial judge specifically expressed that he was not considering that statement. He also claims it was error for his attorney to call as a sentencing witness his brother who testified that defendant could be explosively violent when drinking. The witness was interviewed and his comment at sentencing was unexpected. Defendant also

claims his lawyer should have brought in an expert to testify about his poly-substance abuse and emotional difficulties. The trial judge made a detailed analysis of the doctor's report and how it tied into the overall picture. He concluded that the expert testimony would have likely hurt him more than helped him.

#### Proportionality Review

Since 1976, the Arizona Supreme Court has independently engaged in a proportionality review of each death penalty case. The court notes that such review is not constitutionally required and decides to discontinue proportionality reviews. In concurrence, Chief Justice Feldman states that the court should not abandon proportionality review in capitol cases. ^

#### Personnel Profiles

George Alegria joined our office on March 1, replacing Ed Cope as the office aide for Group D. George has completed 12 hours of post-high school computer training and one year in the legal assistant's program at Lamson Junior College. He has previous work experience with a janitorial service.

On March 8, three new attorneys began employment with us in addition to Colleen McNally (reported in last month's newsletter). They are as follows:

\*Michelle Allen earned her undergraduate degree at Santa Clara University where she was student body president. She graduated from ASU's law school and was admitted to practice in Arizona last October. She has interned at the City of Phoenix prosecutor's office, the Arizona State Senate, and the offices of Senators DeConcini and McCain. She also has been serving as the volunteer project director of the ASU Homeless Legal Assistance Project.

\*Jim Lachemann received his undergraduate degree from ASU and his law degree from Cal Western. He was admitted to practice in Arizona in October of 1992. While at Cal Western, Jim clerked at the California Attorney General's Office. He recently has worked on legal issues with professional athletes in association with a California law firm.

\*Elizabeth (Liz) Melamed received her law degree from Albany Law School in New York. She was admitted to the bar in Georgia and was an associate there at a law firm which focused on criminal defense. In August of 1992 she began working in Maricopa County Superior Court as Judge Schneider's bailiff, and in January of 1993 she was admitted to the Arizona bar.

Linda Gilbert will start as a legal secretary for Group C on March 29. She comes to us from Stein & Stein, P.C. where she served as a receptionist/word processor. Linda has completed the Legal Paraprofessional Program at the American Institute. ^

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**MARICOPA COUNTY OFFICE OF THE PUBLIC DEFENDER**

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**MISSION STATEMENT**

*To provide, pursuant to constitutional and ethical obligations, effective legal representation for indigent persons facing criminal charges, juvenile adjudications and mental health commitments when appointed by Maricopa County Superior and Justice Courts.*

**VISION STATEMENT:**

To achieve national recognition as an effective and dynamic leader among organizations responsible for legal representation of indigents.

**GOALS:**

- \* TO PROTECT THE RIGHTS OF OUR CLIENTS AND GUARANTEE THAT THEY RECEIVE EQUAL PROTECTION UNDER THE LAW
  - \* TO ENHANCE THE PROFESSIONALISM AND PRODUCTIVITY OF ALL STAFF
  - \* TO PURSUE THE DEVELOPMENT OF COST-EFFECTIVE ALTERNATIVES TO INCARCERATION
  - \* TO PERFORM OUR OBLIGATIONS IN A FISCALLY RESPONSIBLE MANNER
  - \* TO ENSURE THAT ETHICAL AND CONSTITUTIONAL RESPONSIBILITIES AND MANDATES ARE FULFILLED
  - \* TO PRODUCE THE MOST RESPECTED AND WELL-TRAINED ATTORNEYS IN THE LEGAL COMMUNITY
- 
-